



Inland Empire Waterkeeper

Advocacy • Education • Restoration • Enforcement

3741 Merced Drive, Unit F2
Riverside, CA 92503
Phone 951-689-6842
Fax 951-689-6273
Website www.iewaterkeeper.org

November 23, 2009

Via Electronic Mail: mmacario@waterboards.ca.gov

Chair Carole H. Beswick and Members of the Board
California Regional Water Quality Control Board, Santa Ana Region
Attn: Maria E. Macario, Water Resources Control Engineer
3737 Main Street, Suite 500
Riverside, CA 92501-3348

RE: Comments on the proposed San Bernardino County MS4 Permit

Dear Chair Beswick and Members of the Board,

Inland Empire Waterkeeper (“Waterkeeper”) is an environmental organization with the mission to protect and enhance the water quality of the Upper Santa Ana River Watershed through programs of advocacy, education, research, restoration and enforcement. On behalf of our members, we submit the following comments on Draft Tentative Order No. R8-2009-0036, San Bernardino County Flood Control District, County of San Bernardino and Incorporated Cities of San Bernardino County, Area-Wide Urban Storm Water Runoff Management Program (“Permit”), NPDES Permit No. CAS618036. Our comments focus on technical and substantive areas of concern the modification of which would help to resolve San Bernardino County’s chronic water quality issues.

Waterkeeper commends the Santa Ana Regional Water Quality Control Board’s (“Regional Board”) commitment to increasing the water quality of the Santa Ana River Watershed and sincerely hope to continue our partnership in making the Inland Empire a cleaner and more secure environment. We appreciate the amount of hard work and dedication the creation of a draft MS4 permit demands and hope our comments and recommendations are considered in the light they are delivered. We seek to make a good draft MS4 permit better by seeking clarification, encouraging the development of ideas, and ensuring uniform application of the Permit’s mandates and requirements. In cooperation with the Regional Board, Waterkeeper believes this Permit could become a model for future MS4 permits and encourages all participants to embrace this opportunity.

In the interest of the reader, this comment letter’s format mirrors that of the Permit and focuses on those sections which demand the greatest amount of revision.

Low Impact Development BMPs

Waterkeeper reads the Permit as requiring a site to use LID BMPs to retain or biofiltrate onsite the runoff from a design storm event. As a result, the Permit allows biofiltrated runoff to count toward LID requirements, which is a requirement both less stringent and less protective of water quality than contained in other Permits recently adopted in California, which either do not allow for biofiltration to count towards a site's LID obligations (*see* NPDES Permit No. CAS004002), or allow for use of biofiltration to meet a site's LID obligations only in cases of demonstrated technical infeasibility of onsite

retention. As currently drafted, the Permit would conceivably allow a site to discharge all of its stormwater to the MS4 system through biofiltration, without any requirement that the site retain water onsite, or that the site undertake any offsite mitigation of the volume of water that is biofiltrated.

As identified by other Permits recently adopted in the state, biofiltration is not as effective a means of reducing pollutant load as onsite retention, nor does biofiltration ensure downstream impacts such as flooding or erosion will be reduced to the same extent.¹ As a result, allowing biofiltration to substitute for use of onsite retention practices such as infiltration, evaporation, or capture, which do not allow for runoff from the 85th percentile storm to leave a site at all, falls short of the maximum extent practicable standard required by the Clean Water Act. Other jurisdictions have developed policies that reflect the strengths of retention and the shortcomings of biofiltration. For example, Philadelphia, West Virginia, and Anacostia (Washington D.C.) have adopted standards that infiltrate, use onsite, or evaporate all precipitation except that which exceeds a specified storm volume. (There should be full cites to these Permits in our previous North OC letters). More locally, the Los Angeles Regional Water Quality Control Board recently approved NPDES No. CAS00402, the MS4 permit for Ventura County and its incorporated cities. That permit does not, like the current draft Permit, allow biofiltration BMPs to count toward LID obligations. Rather, the Ventura permit requires that a project employing biofiltration must compensate through mitigation measures. We recommend that you revise your Permit in a similar manner so that a site must both demonstrate technical infeasibility of onsite retention practices prior to use of biofiltration, and must then mitigate offsite any reduction in the removal of pollutants resulting from the use of biofiltration instead of retention-based BMPs.

Conclusion

Waterkeeper appreciates the effort the Regional Board and its staff have put towards developing an effective MS4 permit for San Bernardino County which effectively and efficiently addresses the environmental concerns of the watershed in a transparent and comprehensive approach.

When reviewing any administrative document concerning water quality it is critically important to reflect upon the purpose of the Clean Water Act ("Act"), that being to "restore and maintain the chemical, physical and biological integrity of the nation's waters"² and to accomplish the lofty goal of "eliminating the discharges of pollutants by 1985, and to enhance water quality nationally to a 'fishable/swimmable' level by 1983."³ The fact that the Act's original Congressional mandate has not been met should not be minimized or forgotten.

Finally, the Regional Board should be resolute in ensuring the adoption of this Permit in recognition of the increasing need for clean water. Brief economic disruptions, while regrettable and unenviable, provide an insufficient rationale for regulatory delay. Although the global recession has impacted San Bernardino County to a significant degree the Regional Board must remember that recessions are transitory and cannot be allowed to dictate foundational regulatory mandates such as those under the Act.

¹ In this vein, both environmentalists and industry representatives agree that "biofiltration," is a vague term that fails to provide sufficient guidance, and is therefore subject to abuse. (See Correspondence from Dr. Mark Grey to Mr. Michael Adackapara, Santa Ana regional Water Quality Control Board, February 13, 2009, at 6)

² 33 U.S.C. § 1251(a); *see also* Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001).

³ 33 U.S.C. §§ 1251(a)(1), (2); Philip Weinberg and Kevin A. Reilly, Understanding Environmental Law, 118,119, Second Edition, LexisNexis 2008.

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In conclusion, the Regional Board should avoid granting extensions because all parties possessed advanced notice of the expiration of the existing MS4 permit and San Bernardino County and Riverside County staff were in attendance at regional MS4 permit meetings over the past year. This actual knowledge by county staff of the criteria considered by the Regional Board and stakeholders concerning the issuance of new MS4 permits provided staff with adequate time to prepare for the deliberations concerning the San Bernardino MS4 permit. The granting of an extension would unreasonably delay attaining increased water quality objectives and recharging depleted groundwater through the wider implementation of LID principles.

Sincerely,

A handwritten signature in black ink that reads "Garry Brown". The signature is written in a cursive, flowing style.

Garry Brown
Executive Director
Inland Empire Waterkeeper